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July 28, 1997

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JUL 28 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Mr. William F. Caton, Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: **Notice of Ex Parte Presentation**  
Closed Captioning and Video Description of  
Video Programming, MM Docket No. 95-176

Dear Mr. Caton:

This is to provide notice that Steven Shelanski, Vice President of Program Acquisition of Encore Media Group LLC ("Encore"), and Richard H. Waysdorf of Encore, and Robert L. Hoegle, counsel for Encore, separately met on July 25 with the following persons regarding the above-referenced rulemaking: Gretchen Rubin, Legal Advisor to Chairman Hundt; Marsha McBride, Legal Advisor to Commissioner Quello; Suzanne K. Toller, Legal Advisor to Commissioner Chong; and Anita Wallgren, Legal Advisor to Commissioner Ness. An original and one copy of this letter and enclosures are being submitted to you for inclusion in the record in this proceeding, and copies are being provided to each attendee.

During those meetings, we discussed the application of the proposed rules to movie programming services. We generally reviewed the factual subjects set forth in the enclosed "Encore Media Group LLC: Movie Network Concerns About Captioning Requirements" and the attachments. We also reviewed briefly the "Encore Media Group Fact Sheet."

During the course of such review, we responded to questions from the Commission attendees regarding the data presented in the above documents.

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Mr. William F. Caton, Secretary

If you have any questions regarding the above information or enclosures, please contact the undersigned.

Very truly yours,

Robert Hoegle  
Robert L. Hoegle *RLH*

RLH:jsl  
Enclosures

cc: Gretchen Rubin, Esquire (w/encl.)  
Marsha McBride, Esquire (w/encl.)  
Suzanne K. Toller, Esquire (w/encl.)  
Anita Wallgren, Esquire (w/encl.)



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**ENCORE MEDIA GROUP**  
**Fact Sheet**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**OWNERSHIP**

Encore Media Group ("EMG") is a venture of Liberty Media Corporation (80% ownership) and Liberty's parent company, Tele-Communications, Inc. (20% ownership). EMG is the parent of 11 premium movie networks, including **encore**, **STARZ!** and **MOVIEplex**.

**OVERVIEW**

EMG is the largest provider of premium movie channels in the United States, currently counting 11 domestic networks. **encore**, an affordable premium service featuring all-time movie favorites from the '60s-'90s; **MOVIEplex**, theme by day movies; six thematic multiplex services -- **Love Stories**, **Westerns**, **Mystery**, **Action**, **True Stories**, and **WAM! America's Kidz Network**; **STARZ!**, a premium movie service with approximately 40% of Hollywood's first-run theatrical output, and **STARZ!**, featuring a double feature movie-theater format; **BET Movies/STARZ!**, the first urban and black-oriented movie channel devoted to showcasing black film artists. In addition, EMG's **International Channel** offers multi-lingual basic cable programming in 29 different Asian, European and Middle Eastern languages to 7.5 million subscribers in the U.S. and Latin America.

<sup>1</sup> All networks carry either registered or service marks including the tagline, an encore network.

**DEMOGRAPHICS**

EMG's "mood on demand" entertainment options offer a variety of high-quality movies designed to appeal to an entire household with diverse tastes. Every EMG network offers an east and west coast feed to insure the best movies at the right times.

**AFFILIATES**

More than 1,275 affiliates, including every major cable system nationwide; TVRO distributors; DirecTV (DBS), PrimeStar (DBS) and AlphaStar (DBS); SMATV, and Wireless Cable.

**PROGRAMMING**

Launched April 1, 1991, **encore** brings back the **All Time Movie Favorites** -- commercial-free, 24 hours a day. **encore** features hosted movie segments, interviews and movie trivia between films. The network focuses on high-quality movies that received box office success or critical acclaim and include notable stars and/or directors. The unique programming strategy offers viewers a different movie every night of the week and features a premiere every weekend evening.

In 1994, EMC completed its launch of six **Thematic Multiplex** premium movie channels. The genre-specific channels provide viewers with "Mood on Demand" entertainment options.

*Launched July 7, 1994:*

**Love Stories**

**Westerns**

**Mystery**

*Launched September 1, 1994:*

**Action**

**True Stories & Drama**

*Launched September 12, 1994:*

**WAM! America's Kidz Network**

- more -

## ENCORE FACT SHEET, PAGE 2

**STARZ!**, a first-run premium multiplex movie channel, launched nationwide on February 1, 1994. STARZ! features exclusive first-run releases from Universal Pictures, Miramax Films, New Line Cinema, Fine Line Features, Imagine Entertainment and Turner Pictures, among other leading distributors. In January 1997, STARZ! also began offering exclusive first-run films from Touchstone and Hollywood Pictures.

It's "prime time any time" on STARZ!<sup>1</sup>. Bringing you first-run exclusives plus signature Encore library titles scheduled throughout the day, STARZ!<sup>2</sup> delivers a quality viewing alternative at any time. The initial analog feed of STARZ!<sup>2</sup> was launched March 15, 1996. In prime time, STARZ!<sup>2</sup> emulates the movie theatre experience by scheduling the same double feature for one week, creating prime time's most dependable outlet.

\* **BET Movies/STARZ!**<sup>3</sup> is the first urban and black-oriented movie channel devoted to showcasing black film artists. **BET Movies** benefits from STARZ!'s long-term output deals with Hollywood's biggest studios -- including Miramax, Universal, Touchstone/Hollywood Pictures and New Line -- for exclusive first-run theatrical releases. In addition to the best first-run movie selections, **BET Movies** draws upon ENCORE's extensive library of over 10,000 movies, including many landmark black films. The channel launched February 1, 1997, coinciding with Black History Month.

\* **MOVIEplex-encore 1<sub>SM</sub> -Theme by Day**. Launched October 1994, **MOVIEplex** is one channel based on EMG's Thematic Multiplex and **encore's All Time Movie Favorites**, themed by day:

Sunday	WAM! America's Kidz Network	Thursday	Action
Monday	Love Stories	Friday	Mystery
Tuesday	ENCORE	Saturday	True Stories
Wednesday	Westerns		

### OTHER EMC VENTURES

**Encore International, Inc. ("EI")**, an affiliate company of Encore Media Group, was founded in 1995 to develop programming and channels for international distribution. EI is involved in an unprecedented bilateral program exchange agreement with China Central Television (CCTV) where EI supplies programming that airs daily in primetime on CCTV's general entertainment network. In exchange, Chinese programming from CCTV is shown on EMG's International Channel in the United States. Encore International is also a joint venture partner of MGM Gold Networks (Asia) which has launched in Southeast Asia. MGM Gold is Asia's first Hollywood studio-branded movie channel. Encore International's first venture was the launch of Australia's first two premium cable channels: Encore and Showtime.

**International Channel ("IC")** was designed for world travelers, international business people, educators, students and immigrants to the U.S. and offers a variety of multi-lingual basic cable programming. The programming featured includes movies, news, sports and television series more than 20 different Asian, European and Middle Eastern languages. EMG is the managing partner of IC.

**Encore Entertainment Group ("EEG")** was formed in 1995 to manage all of EMG's programming activities, including acquisitions, on-air production and promotion, and planning and scheduling. EEG also oversees development of STARZ! Pictures original movies, including releases *The Assassination File*, *Twilight Man*, *Escape From Atlantis* and other original programming for all of EMG's networks.

- more -

# **ENCORE THEMATIC MULTIPLEX**

- Dependable Destinations . . . Mood on Demand
- Uncut Commercial Free Programming 24 Hours / Day
- Theatrical Movies, Made for TV Movies and Series

**LOVE STORIES-encore 2:** A choice of movies in which love and romance is the central theme.

**Butterfield 8**  
**Look Who's Talking**  
**Sunday in New York**

**WESTERNS-encore 3:** Popular westerns, plus classic series like "The Lone Ranger."

**Lonesome Dove**  
**The Alamo**  
**Proud Ones**

**MYSTERY-encore 4:** Intriguing films about amateur sleuths, hard-boiled detectives and classic series like "The Avengers" and "Peter Gunn."

**The Wrong Man**  
**North by Northwest**  
**Family Plot**

**ACTION-encore 5:** Action-packed movies and series like "Combat" and "The Highlander."

**They Live**  
**Four Musketeers**  
**Shamus**

**TRUE STORIES & DRAMA-encore 6:** Compelling reality-based movies and thought provoking dramatic films.

**Cast the First Stone**  
**Pride of the Yankees**  
**Talk Radio**

**WAM!-encore 7:** Wholesome and fun television programs for kids age 8 to 16 including popular educational series like "Sky Trackers" and "F.R.O.G." WAM! also features popular family movies.

**Paper Moon**  
**Huckleberry Finn**  
**The Champ**

JUL 28 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**ENCORE MEDIA GROUP LLC****MOVIE NETWORK CONCERNS ABOUT CAPTIONING REQUIREMENTS**

- I. Imposing the obligation to caption on the video provider rather than the program producer suffers from the fundamental problem that the video provider does not own virtually any of the programming it carries, and therefore retains no residual value from undertaking captioning of that programming.**
- Only the program owner has the economic incentive to add captioning and then recoup its captioning investment by reselling the captioned programming again in the marketplace.
  - Especially in the case of films and older TV series (e.g., those not in syndication), we must buy large volumes of titles in very long contracts, typically 7 or more years, not on an individual program basis. Networks cannot simply "refuse to purchase" a particular film based on whether it is captioned or not. Even when new contracts are entered into or contracts are renewed, we have no significant leverage to demand that captioning be undertaken by the producer.
- II. For older library programming, the ultimate goal of requiring 75% of such older programming to be captioned is reasonable for programming created after 1970, but requiring that level of captioning in 8 years is much too soon.**
- While a 15-year deadline for the 75% minimum is preferred, even a 12-year or 10-year requirement would relieve undue burdens on our networks.
  - Our movie library is purchased in packages of several hundred films at a time in long term contracts, typically 7 or more years. We have purchased thousands of films for our library to supply eleven movie networks through contracts extending through 2005 and beyond.
  - Once each of these contracts was signed, we lost whatever leverage we may have had to negotiate for captioning of the titles included in those contracts
  - The license agreements themselves often limit our rights to caption even if it were economically feasible to do so.
  - The captioning deadline should at least extend substantially beyond the term of existing library contracts, or it would penalize classic movie networks, who by the nature of their business must commit to long term, high volume film license agreements.

- Even for contracts that end before 8 years, there will still be a shortage of films available for certain of our channels, especially Love Stories, Westerns, Mystery, and True Stories, because the film licensors will still be unlikely to go back and caption older films.
- For our children's educational network, WAM!America's Kidz Network, we feature educational programming produced all over the world, which is unique to our network. Outside of the US, captioning is virtually unheard-of. Educational programming on WAM! Is not a profit-making venture -- it is pure public service.
- We have recommended that all childrens' educational programming be exempt from the captioning requirements, for the reason that the cost of captioning will easily exceed the cost of licensing this programming and it simply won't be aired. While we are hopeful that government funding and private grants will fill the need for captioning, an unfunded mandate will cut off the availability of such very special educational programming.

**III. Encore suggests creating a further exemption for older programming where it is no longer economically feasible to caption the programming, for example for programming first created before 1970.**

- The key here is not what the revenues are of the video provider that airs this older programming, but whether this older programming will be lost to viewers -- simply not aired, contrary to all of the Commission's efforts to increase the diversity and variety of programming available to viewers -- because the cost of captioning is too high compared to its value in the marketplace, given that the video providers do not own the programming.
- Our data shows that there is a greatly reduced value, as shown by relative license fees, for feature films and older television series made before 1970, with even more drastic reductions for each decade before that. License fees per film produced in the 1960s are approximately one-third of the license fees per film produced in the 1970s, and license fees for films produced in the 1950s and before that drop off even more dramatically. Therefore, the ability to recoup the cost of captioning drops off dramatically as well.
- An exemption for programming first exhibited prior to 1970 would not avoid the requirement of captioning most TV series still being aired on most networks, only older movies and series episodes which have extremely limited licensing value.
- An exemption that would apply primarily to older feature films and series episodes is appropriate to allow the airing of the greatest variety and range of such films. This

differs from most recent TV series (e.g., those in syndication), where the license agreement is signed for that series alone, and then that series can be captioned based on the revenues anticipated from that series.

- Here we sign agreements for several hundred film titles at a time, some of which will be aired, and some of which have very limited utility. If the thousands of films from which we now pick and choose to program our channels are limited in the next contracts to those which the studio chooses to expend the money to caption, the tremendous variety of films aired on our Thematic Multiplex networks will be reduced. We may then be forced to repeat films more often or cut back on the number of channels we offer to viewers.

**IV. The "existing contracts" exemption must be much broader than just contracts that expressly prohibit captioning. Where rights to caption are not expressly provided, a network could be in breach of its multimillion-dollar licensing agreement, or infringing a copyright.**

- This exemption could become much more important an issue if the library captioning deadline is imposed at 8 years, which is less than many outstanding film library licensing contracts.
- Most studio/network licensing agreements only grant to the networks very limited exhibition rights, and specifically reserve to the copyright owner or distributor all rights not affirmatively granted in the limited license agreement.
- Other contracts may not expressly prohibit the licensee from creating a new captioned version of the film, but do expressly prohibit the licensee from editing or altering the film in any way. Such a broad prohibition against making any alteration to a copyrighted work would likely be read by the licensor to prohibit the licensee, such as Encore, from creating a captioned version of the work.
- For example, one of Encore's major film library agreements states that "Licensee shall not have the right to edit, alter (including but not limited to Exhibiting only a portion of a Licensed Film), time compress or expand any of the Licensed Films or any portion thereof."
- Another of Encore's major film library agreements provides Encore limited exhibition rights in the subject films, and then includes the following broad reservation of rights to the studio: "All licenses, rights and interest in, to and with respect to the Licensed Pictures, elements and parts thereof, and media of transmission not specifically granted herein to Licensee shall be, and are specifically and entirely reserved to [the studio] . . . ." Further, this agreement provides that ". . . neither Licensee nor any Affiliated System shall cut, edit, change, add to, delete from or revise any Licensed Picture . . . ."



- Even where we are granted a limited right to edit or where the contract is silent, the right to create a closed captioned version of a film (i.e., a derivative work) is not typically implied in studio contracts. Hence, even the presence of a limited editing right does not imply a right to create derivative works.
- The studios are characteristically vigilant in enforcing the agreements' rights limitations, and the provisions of these agreements could reasonably be read as prohibiting the creation of a new captioned version of the works covered by such contracts by Encore.
- The rights to films exhibited by Encore's networks are its most important properties; Encore cannot risk a default incurred by a violation of such provisions.

**V. The rules should exempt interstitial programming which should be defined as including all short form programming of a certain limited duration.**

- Rather than attempt to define what type of "interstitial" or promotional programming should be exempt, the Commission should adopt a bright-line, time-based approach as advocated by us and MPAA -- if the material is a certain short duration, it can be assumed it's not a regular program, but rather an interstitial promotional piece.
- Such a simple, time-based approach would take the Commission out of having to judge whether a specific type of interstitial meets content-based tests.

**VI. The Commission should create a special exemption for all non-series, non-feature short films.**

- Short films are a special class of artistic programming that has virtually no marketplace value. Such films are often student films or others created on shoe-string budget, using credit card balances or other begged and borrowed funding. We air such short films for their artistic value, not for revenue generating purposes.
- Such programming is directly threatened by a requirement to caption at even \$500 per half hour. A special exemption should be available to prevent such programming from being lost to viewers.

**VII. The 8-year phase-in for new programming is reasonable and avoids undue burdens, but the ultimate captioning requirement should be 95% rather than 100% to eliminate the need for the Commission to rule on waivers and hardship petitions.**

## ENCORE MEDIA GROUP

## INCREMENTAL COST TO CLOSE CAPTION LICENSED FILMS

-- 1998-2002

	TOTAL		30'S		40'S		50'S		60'S		70'S		80'S		90'S	
	% CC	Cost to Caption non-CC titles	% CC	Cost to Caption non-CC titles	% CC	Cost to Caption non-CC titles	% CC	Cost to Caption non-CC titles	% CC	Cost to Caption non-CC titles	% CC	Cost to Caption non-CC titles	% CC	Cost to Caption non-CC titles	% CC	Cost to Caption non-CC titles
Grand Total	14%	\$32,084,000	3%	\$472,000	3%	\$2,812,000	6%	\$4,432,000	8%	\$3,196,000	16%	\$5,204,000	14%	\$10,172,000	34%	\$3,396,000

Analysis does not include any titles that have not had their theatrical release.  
 Analysis does not include licensed titles not yet planned.

Repetitive titles may decrease total costs by up to \$7,000,000  
 while titles under license but not yet planned may increase total cost by up to \$4,000,000  
 for a total variance of (\$3,000,000)

## AVERAGE COST PER FILM/ SERIES EPISODE BY DECADE

